UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C. 20460

June 9, 1999

OFFICE OF
PREVENTION, PESTICIDES AND
TOXIC SUBSTANCES

Joseph D. Friedlander
Environmental Manager
Freedom Mine
204 County Road 15
Beulah, ND 58523-9475

Dear Mr. Friedlander:

This letter is in response to your April 27, 1999 letter to Joyel Dhieux, Region 8, U.S. EPA, concerning the applicability of section 313 of the Emergency Planning and Community Right-to-Know Act (EPCRA) to your facility. In particular, your letter requests guidance on several issues, some of which specifically apply to coal mining (SIC code 12). The following guidance is intended to help you in determining if your facility needs to comply with the reporting requirements of EPCRA section 313. This letter is not intended to serve as a definitive answer as to whether your facility meets the reporting criteria outlined at 40 CFR section 372.22. In other words, this response only addresses those interpretive guidance issues for which you have requested clarification. This response does not address any issues raised in your letter that did not appear to need clarification (e.g., the motor vehicle exemption). Additionally, this response does not assess any specific figures or calculations presented in your letter. In short, this letter only serves as guidance. Your facility must determine if it is required to report under EPCRA section 313. In so doing the facility should use its best readily available information and document the decision-making used to determine if reporting is required.

According to your letter, fly ash generated by a nearby electricity generating facility (EGF) is used by your coal mining facility for haulroad construction. You want to know if this use of ash is exempt from reporting under the coal extraction activities exemption. The coal extraction activities exemption, located at 40 CFR section 372.38(g), reads:

> If a toxic chemical is manufactured, processed, or otherwise used in extraction by facilities in SIC code 12, a person is not required to consider the quantity of the toxic chemical so manufactured, processed, or otherwise used when determining whether an applicable threshold has been met under section 372.25 or section 372.27, or determining the amounts to be reported under section 372.30.

"Coal Extraction" is defined at 40 CFR section 372.3. Coal extraction is defined as:

> the physical removal or exposure of ore, coal, minerals, waste rock, or overburden prior to beneficiation, and encompasses all extraction-related activities prior to beneficiation. Extraction does not include beneficiation (including coal preparation), mineral processing, in situ leaching or any further activities.

"Beneficiation" is also defined at 40 CFR section 372.3. Beneficiation is defined as:

> the preparation of ores to regulate the size (including crushing and grinding) of the product, to remove unwanted constituents, or to improve the quality, purity, or grade of a desired product.

Further, as you correctly point out, EPA has addressed the coal extraction activities exemption in both the EPCRA Section 313 Questions and Answers document (December 1998, EPA 745-B-98-004) and the EPCRA Section 313 Industry Guidance for Coal Mining Facilities (January 1999, EPA 745-B-99-002). According to these sources, ash or other materials used for structural support during extraction activities would be considered part of extraction and would be eligible for the extraction exemption. (1998 Q&A 386). However, this guidance also expressly states that the "otherwise use of ash, overburden, waste rock or fertilizer for reclamation are not considered part of extraction, and amounts of listed toxic chemicals contained in these materials must be considered toward threshold determinations and release and other waste management calculations." (1998 Q&A 386). With regard to what constitutes reclamation 1998 Q&A 383 provides that "the otherwise use of waste rock, ash, or other material in surface mining to replace excavated land is a reclamation activity." Finally, page 3-38 of the Industry Guidance for Coal Mining Facilities, which you reference in your letter, states that "when mine reclamation activities occur simultaneously with, or as a result of, coal extraction activities, which involve materials containing EPCRA Section 313 chemicals, these chemicals are considered eligible for the coal mining extraction exemption, and the facility does not have to consider these amounts toward activity thresholds or release or other waste management calculations."

According to your letter "all fly ash being used on the mine is exclusively for structural support in road construction for coal haulage from active pits to our coal handling facilities. No fly ash is used for land reclamation as backfill, or to mix with topsoil, subsoil, or overburden as part of reclamation operations. . . . (This ash is) [b]eing used exclusively for extraction-related activities prior to beneficiation." Based on these representations, the toxic chemicals in the ash being used for these purposes appear to be exempt from threshold determinations and release and other waste management calculations pursuant to the coal extraction activities exemption.

With regard to your mention of water management structures, the use of toxic chemicals for water management structures is eligible for the coal extraction activities exemption only if the water management structures are used in extraction. If the water management structures are used for reclamation purposes or are used after extraction is completed, then the toxic chemicals associated with these structures are not eligible for the coal extraction activities exemption, regardless of whether these water management structures are required by law to remain in

existence. Accordingly, toxic chemicals used for ponds that were designed, constructed, and operated to contain runoff from extraction related activities are not eligible for the coal extraction activities exemption once extraction has been completed. Also, as your letter correctly states, "if a pond is retained for other purposes, such as treating runoff from a coal handling or ash disposal facility, the exemption would no longer apply." (Page 4).

According to your letter there are several other toxic chemical uses associated with coal extraction. They are: (1) the spraying of toxic chemicals to knock down weeds for soil stripping operations prior to uncovering the next pit; (2) the use of toxic chemicals at substations that support electrical equipment, such as draglines and excavators; (3) the application of dust suppressants to mine haulroads; (4) the dozing of the remains of abandoned farmsteads into active pits as a necessary activity for coal removal; and (5) the use of ash on haulroads for traction. In applying the coal extraction activities exemption to these uses of toxic chemicals you should keep in mind that this exemption only applies to toxic chemicals manufactured, processed, or otherwise used in extraction. Do not extend this exemption to toxic chemicals manufactured, processed, or otherwise used after extraction is complete.

Further, bear in mind that there is no inconsistency between the coal extraction activities exemption and the guidance provided for ash that is sent off-site for the specific applications addressed in the Industry Guidance document for EGFs (January 1999, EPA 745-B-99-003). Page 3-49 of the EGF guidance document states:

> EPCRA Section 313 chemicals in ash sent off-site for use as roadfill, landfill, and in mining reclamation are being managed as a waste; therefore they are not eligible for the *de minimis* exemption.

(In your letter you reference the January 20, 1999 letter from the Toxics Release Inventory Branch to Mitchell L. Press of DuPont-Chambers Works located in Deepwater, New Jersey, as well as the February 26, 1999 letter from Region 8 to Fred Carl of Black Hills Power & Light Company located in Rapid City, South Dakota.) The toxic chemicals in the ash being used by your facility as fill are being managed as waste. However, as stated above, if the ash is being used for structural support during extraction, then the toxic chemicals in the ash being used for this specific application would qualify for the coal extraction activities exemption (1998 Q&A 386, *supra*) and the toxic chemicals in the ash used for that specific application would not have to be considered toward threshold determinations and release and other waste management calculations. While the toxic chemicals in the ash used for structural support during extraction are, in fact, being managed as a waste in addition to being otherwise used, they are exempt from threshold determinations and release and other waste management calculations because they qualify for a specific exemption; the coal extraction activities exemption. Accordingly, if the same ash was used in reclamation activities then the toxic chemicals in the ash would no longer be eligible for the coal extraction activities exemption (1998 Q&A 386, *supra*) and the toxic chemicals in the ash would have to be considered toward the appropriate otherwise use activity thresholds as well as being included in the appropriate release and/or other waste management calculations.

Further, in your letter you discuss your facility's leasing of reclaimed lands to private individuals for their own benefit to grow a crop. According to your letter, your facility bears no expense and makes no profit as a result of the private farmers' activities. The farmers apply pesticides and fertilizers on the reclaimed lands. The farmers, and not the facility, choose and purchase the chemicals that are applied to the land. Additionally, with regard to the chemicals being used, you state that the farmers are directly responsible for proper licensing, training, application, storage, waste disposal, maintenance, and record keeping. It appears, based on these facts, that you believe that 40 CFR section 372.38(e) relieves your facility from considering for EPCRA section 313 purposes the chemicals being used by the private farmers to whom the facility is leasing reclaimed facility property. Section 372.38(e) reads, in pertinent part, as follows:

> *Certain owners of leased property*. The owner of a covered facility is not subject to reporting under section 372.30 if such owner's only interest in the facility is ownership of the real estate upon which the facility is operated.

(Emphasis Added.) This exemption is clearly limited to owner's who only have a real estate interest in the facility. In your case, the leased property does not constitute a separate facility. Your facility still owns the land being leased and the leased land is "contiguous or adjacent" to the mining operations, and therefore, the leased land is part of the mining facility. (See 40 CFR 372.3 for the definition of facility.) As you state on page 5 of your own letter "certainly the entire coal mine falls under this definition as one single facility." In short, because the leased property is on facility grounds, the exemption provided for at 40 CFR section 372.38(e) does not apply. Accordingly, the facility should use its best readily available information in applying for threshold determinations and release and other waste management purposes any toxic chemicals being used by the private farmers on property that is part of your facility.

Finally, the *de minimis* exemption is another issue that warrants comment based upon the description of activities taking place at your facility. According to your letter the ponds for draining coal handling facilities were evaluated. You further state that coal runoff into these ponds is exempt under the *de minimis* exemption. You are correct that the *de minimis* exemption may apply. "A facility does not have to report toxic chemicals contained in an on-site stockpile of material that is intended for otherwise use on-site as a release to land on-site. . . . Because, in this instance, storage is associated with the otherwise use of the coal, releases from the stock pile will be eligible for the *de minimis* exemption." (1998 Q&A 531). Accordingly, if the concentrations of toxic chemicals in the stockpiles that are being otherwise used do not meet or exceed the *de minimis* levels specified for the toxic chemicals in the stockpile, then the *de minimis* exemption would apply. However, keep in mind that coincidental manufacturing is likely to result from exposed coal piles. (Page 3-31 of the Coal Mining Guidance document). Coincidentally manufactured toxic chemicals carried away in runoff are not exempt pursuant to the *de minimis* exemption because the *de minimis* exemption does not apply to coincidentally manufactured byproducts. (1998 Q&A 315 and Page 3-31 of the Coal Mining Guidance document).

I hope this information is helpful to you in making threshold determinations and release and other waste management calculations for section 313 of EPCRA. If you have any other questions, or desire further information, please call either Larry Reisman at 202.260.2301 or me at 202.260.9592.

Sincerely,

Maria J. Doa, Ph.D., Chief
Toxics Release Inventory Branch